

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.287 OF 2004

Smt. S. N. Kothari

...Applicant

V/s.

Asstt. Director of Enforcement ...Respondents
& Anr.

Ms. Chandana Salgaokar for the Applicant.

Mr. R. F. Lambey for the Respondent No.1.

**CORAM : A.S. OKA, J.
DATED : JULY 08, 2005.**

P.C.:

1. The parties were heard on the last date. The challenge in this Criminal Revision Application is to the Judgment and order dated 16th March, 1999 passed by the Chief Metropolitan Magistrate by which the Applicant and other accused were convicted for the offences punishable under section 56(1)(i) of the Foreign Exchange Regulation Act, 1973 read with sections 68, 18(2) of the said Act of 1973. The Applicant and the accused No.3 who is her husband were sentenced to suffer imprisonment for a period of three months and both the accused were directed to pay fine of Rs.1,00,000/- and in default in payment of fine, the accused were directed to undergo further imprisonment for period of three months. In an appeal preferred by the Applicant, the conviction and sentence of the Applicant has been confirmed by the Sessions Court.

2. The learned Counsel appearing for the Applicant submitted that the Applicant is a 61 year old lady and she has lost her husband recently who was accused No.3. The learned Counsel submitted that in fact she was not really responsible for carrying out the day to day activities of the M/s.D.S. International. She pointed out that in adjudication proceedings, total penalty of Rs.30 Lakhs was directed to be paid by all the three accused and in fact the payment of the said amount has been made by the Applicants. The learned Counsel relied upon proviso to clause (i) of sub-section (1) of section 56 of the said Act of 1973 and submitted that for adequate and special reasons to be mentioned in the judgment, the learned Magistrate was empowered to impose a sentence for a period less than six months. The learned Counsel has placed reliance on the various decisions of the Apex Court and this Court, a reference to which will be made later on. The learned Counsel submitted that on the basis of bills discounting facility, concerned Bank has filed a suit for recovery of the amount from the British Company and the said suit has been decreed. The learned Counsel therefore, submitted that the courts below ought to have invoked the proviso to clause (i) of Sub-section 1 of Section 56 and ought not to have sentenced the Applicant to suffer imprisonment and at the highest fine ought to have been awarded. Learned Counsel lastly submitted

that this is a fit case where the order of sentence directing the Applicant to undergo the imprisonment should be set aside. The learned Counsel appearing for the Respondents submitted that the learned Magistrate has already exercised the discretionary power under the proviso of clause (i) of sub-section (1) of section 56 of the said Act of 1973 and has awarded imprisonment for a period of three months which is less than the minimum punishment of six months contemplated by the statute. He stated that the Applicant was herself conducting the business. He submitted that the suit filed by the Bank was irrelevant.

3. I have considered the rival submissions. The Accused No.1 exported under the licence granted in its favour silk sarees of the total aggregate value of 4,28,723/- U.K.pounds which is equivalent to Rs.64,30,845/- in favour of an incorporated Company in England. According to the prosecution an amount of Rs.1,90,778/- pounds was due and payable by the said company to the accused No.1. The finding recorded by the learned Magistrate is that no steps were taken by the accused for the recovery of the said balance amount. The learned Magistrate held that the accused failed to take reasonable steps to realise proceeds and infact no evidence was led to show that any steps were taken. Both the courts have found that

opportunity notices were received by the accused persons.

4. The learned Magistrate while considering the question of sentence held thus:

"33. The facts of the case are fresh in my mind. The incident is of the year 1983 and the record shows that from 1983 proceedings like adjudication proceeding and the present proceeding are going on. The health of the accused No.3 is not good and accused No.2 is a lady. Considering the period for which the accused persons have already faced some agony I hold that lenient view to some extent can be taken in the present case. However, the offenders from economic offences cannot be let off only by imposing penalty of fine amount and there has to be the plenalty of imprisonment. Considering all the facts and circumstances, I pass the following order:....."

While dealing with the same submission, the learned

Sessions Judge held thus:

B. Now as far as the sentence is concerned, in para 32 of the Judgment the trial court has already given reasons for taking a lenient view. The grounds which were advanced before me that the offence is old, that the accused No.3 is a paralytic patient are the same grounds which were already taken before the trial court and considered by them. When a lenient view is already taken on these grounds by the trial court I do not find any reason to interfere with the sentence that is passed by the trial court. There has to be a balance between leniency to be shown by the court and the nature of the offence and that to my mind has been properly achieved by the reasoning given by the trial court. In the result, the entire Appeal has to fail.

A reliance is placed by the learned Counsel for the Applicant on the decision of the Apex Court reported in 1993 Supreme Court Cases 68 (Ananda Dagadu Jadhav & Ors. Vs. Rukminibai Anand Jadav(Smt) & Anr). It was a case where offence was committed under section 494 of the Indian Penal Code and in the facts of the said case, the Apex Court held that the punishment of imprisonment was liable to be reduced to the period which is already undergone. The second decision relied upon by the Counsel appearing for the Applicant is reported in (2000) 10 Supreme Court Cases 370 (Datla Krishnam Raju Vs. Excise Sub-inspector, Kowatalam, A.P.J.). Considering the fact that ten long years had elapsed from the date of occurrence and considering that the accused had already undergone sentence for 45 days, the Apex Court reduced the sentence to one already undergone. Perusal of the judgment shows that this was the view taken in peculiar facts of the case. Reliance was also placed on the decision of the Apex Court reported in AIR 1971 Supreme Court 2162 (Girdhari Lal Gupta Vs. D.N. Mehta & Anr.). Perusal of paragraph No.15 of the said decision shows that the Court was considering the question of quantum of sentence where a person was being vicariously punished for an offence. In the facts of present case, it is noted that in the statement under section 313 of the Code of Criminal

Procedure, 1973 the Applicant stated that "It is true that I was the proprietress of accused NO.1". The learned Single Judge of this court in a decision reported in 2000(3) Maharashtra Law Journal 817 (Kiran Shailen Vs. State of Maharashtra) has taken a view that a sleeping partner of firm, where it was alleged that the contravention of provisions of FERA Act was made by firm, was entitled to be discharged. This decision will have no application as the Applicant is not a sleeping partner. Lastly, reference is made to the decision of the Division Bench of this Court reported in 1993 Maharashtra Law Journal 1085(Allana Sons Vs. F.E.R.A. Board). This was a case where contention was that the delay in compliance with the provisions of law was due to reasons which were beyond the control of the exporter. This is not the finding of fact recorded in this case.

5. In the statement of the Applicant, she has not stated that she was a sleeping partner. On the contrary, categorical stand taken is that she is proprietress of the accused No.1. At no stage of the proceeding, I find that a stand is taken that the Applicant was not directly involved in the day to day activities of the accused No.1. The Applicant being the owner of the accused No.1 was directly responsible for the business activities of the accused No.1. At one stage, stand is taken that she is a Director

alongwith the accused No.3 of the accused No.1. The accused No.1 however, does not appear to be a public or private limited company.

6. It cannot be disputed that the power under the proviso to clause (i) of sub-section (1) of section 56 of the said Act of 1973 is a matter of exercise of discretion. The learned Magistrate exercised the discretion after considering all relevant factors and reduced the sentence to three months, which is less than minimum prescribed by the statute. This is a case where the applicant has not undergone any sentence of imprisonment. The default in recovering the foreign exchange was made by the accused No.1 and therefore, mere payment of penalty in Indian currency in adjudication proceedings cannot be a ground to exercise discretion in a Revision Application. When the power is already exercised by the learned Magistrate by reducing the sentence to less than statutory minimum and when the Sessions Court rejected the submission made for further reduction of the sentence of imprisonment, no interference can be made in Revision Application. I must record here that no submissions were made on merits of the order of conviction.

7. Hence, there is no merit in the Revision Application and the same is rejected.

8. At this stage the learned Counsel appearing for the Applicant prays that sufficiently longer time to surrender may be granted. Considering the facts and circumstances of the case, time of ten weeks is granted to surrender.

JUDGE